OGBODO SUNDAY TOCHUKWAU v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
AHMADI ASNAWI JCA
ZAMANI A RAHIM JCA
[CRIMINAL APPEALS NO: C-05-229-09-2013, C-05-230-09-2013 & C-05-240-08-2014]
16 AUGUST 2016

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking – Conviction and sentence – Appeal against – Dispensation of justice involving procedural and substantive law – Right to be defended by counsel – Whether trial judge ignored requirement of fair trial – Whether essence of s. 255 of Criminal Procedure Code breached – Failure to comply with s. 257(1) of Criminal Procedure Code – Whether caused prejudice to second accused – Trial judge's refusal to exercise discretion to adjourn trial conferred by s. 259(1) of Criminal Procedure Code – Whether deprived second accused person's right to be heard – Whether there was a failure of justice – Whether conviction tainted*

CRIMINAL PROCEDURE: *Trial – Procedure – Trafficking of dangerous drugs – Dispensation of justice involving procedural and substantive law – Right to be defended by counsel – Whether trial judge ignored requirement of fair trial – Whether essence of s. 255 of Criminal Procedure Code breached – Failure to comply with s. 257(1) of Criminal Procedure Code – Whether caused prejudice to second accused – Trial judge's refusal to exercise discretion to adjourn trial conferred by s. 259(1) of Criminal Procedure Code – Whether deprived second accused person's right to be heard – Whether there was a failure of justice – Whether conviction tainted*

The three accused persons were jointly charged and convicted and sentenced to suffer the death penalty for trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952. Upon receipt of information regarding a foreign drug syndicate operating in Temerloh, PW5 and his team planned an ambush at Hotel Green Park. Two vehicles were seen in the hotel car park, one Honda Civic with a lady ('third accused') at the wheel and the other being a Proton Saga, with two persons inside ('first and second accused'). The third accused, who was seen alighting from the vehicle she was driving, walked towards the Proton Saga, and communicated with the persons therein before walking towards the hotel. Subsequently, the third accused brought PW6, an agent provocateur to the Proton Saga and proceeded to open the back door of the said motorcar and showed packages in the motorcar. The police then ambushed the vehicles and the Proton Saga was searched whereby a white coloured plastic bag labelled "Joban Creation" was found on the floor board behind the driver's seat. The said

plastic bag contained several small plastic bags that had powdery and crystal like substance in them. The three accused persons and the items were seized. The chemist PW4 confirmed the substance to be methamphetamine weighing 525.3g, and heroin and monoacetylmorphine weighing 173.7g ('the said drugs'). At the end of the prosecution's case, the trial judge was satisfied that the prosecution had proven all the trafficking charges against all the three accused on a *prima facie* case basis and called all the three to enter their defence. The first accused averred that he did not know that there were drugs in the motorcar he was driving nor had he negotiated with anyone for the sale of the drugs; the second accused averred that he did not see who placed the plastic bag in the motorcar and equally denied that he knew the contents of the said plastic bag and further denied he went to Temerloh with the first and third accused persons to transact drugs with PW6 and the third accused denied trafficking or selling the said drugs to PW6. At the end of the defence, the trial judge held that the accused persons failed to raise a reasonable doubt on the prosecution's case and found them guilty of the charges against them and sentenced them to death by hanging. Hence, this appeal by the three accused persons. The three accused persons posited a common ground of appeal that there was a failure of justice inflicted upon them on account of the trial judge's refusal for a day's adjournment of the proceedings applied by counsel for the second accused who was only recently appointed and proceeded to hear the second accused's defence without legal representation and thereafter found the three accused persons stood convicted of the charges proffered against them.

Held (setting aside convictions and sentences; case to be remitted back to the High Court for retrial)

Per Ahmad Asnawi JCA delivering the judgment of the court:

(1) The dispensation of justice involves both procedural and substantive law. Justice cannot be dispensed when its procedures are ignored. The right to be defended by counsel is both an issue of procedure and substantive law. The said right is embedded in our justice system since time immemorial. Section 255 of the Criminal Procedure Code ('CPC') expressly provides that every person accused before any criminal court may as of right be defended by an advocate, subject to any express provision of the law to the contrary. (para 84)

(2) At the end of the cross-examination of the first accused, counsel for the second accused applied to discharge himself which was promptly allowed. But instead of doing the right thing by inquiring whether the second accused would want to engage a new counsel, the trial judge adjourned the hearing to 2.15pm the same afternoon for the second accused's cross-examination of the first accused. The trial judge had offered no ground over the course of action taken over by him. The trial

judge had ignored the requirement of a fair trial and had breached the essence of s. 255 of the CPC. There was no legal impediment then to prevent counsel from defending the second accused. This trial involved a capital offence carrying the mandatory death penalty. Hence, a greater latitude ought to be given to the accused to adequately prepare and properly defend their case. Anything short of the requisite norm would occasion a miscarriage of justice. The trial judge had acted in haste at the expense of justice. (paras 85 & 86)

(3) The second accused was greatly prejudiced by the denial of counsel to act for him and conduct his defence. At the end of the first accused's examination-in-chief, the trial judge told the second accused that he can now question the first accused. However, there was no record of any cross-examination mounted by the second accused. The trial judge should but did not explain to the second accused that in law a failure of cross-examination means an acceptance of the evidence of the first accused. The second accused was thoroughly clueless on how to go about in mounting an effective cross-examination of the first accused's evidence and for that matter, the third accused's. The evidence of the first and third accused were replete with blame game. The second accused was profoundly hapless to negate or repel or resist such blame game. (paras 87 & 88)

(4) The telling evidence against the second accused was his alleged conduct, his attempt to flee, the struggle he put up, the seizure of the drugs from the car he was travelling in and that he came with the first and third accused and it was these factual findings by the trial judge that formed the basis of his conviction. The second accused was clearly disadvantaged. He was not given the proper guide as mandated by law. The failure by the trial judge to comply with the requirement under s. 257(1) of the CPC had immensely prejudiced the second accused. (paras 91-93)

(5) Counsel for the second accused had applied for an adjournment on the ground that he had just been retained by the second accused, but was refused by the trial judge. Hence, in the interest of justice, no harm or prejudice would occur if a little bit more time had been given to the second accused to adequately defend his case. In all the circumstances of the case, the refusal to exercise the discretion to adjourn the trial conferred by s. 259(1) of the CPC was not reasonably exercised by the trial judge. There was no denying that the second accused was overwhelmingly disadvantaged when he was not given the proper direction to put in his submission, either oral or written. There had been a deprivation of his right to be heard on account that the trial judge did not hear his submission whereas the first and third accused and the prosecution was accorded the right and opportunity to do so. (paras 96 & 102)

(6) The second accused had been deprived of a fair trial, amounting to an infringement of a constitutional right and as such the conviction was tainted. Although the infringement related only to the second accused, nevertheless it had occasioned a failure of justice to all the three accused as all the three were charged with common intention in committing the crimes where in such event the culpability of one would invariably affect the culpability of the others. (paras 103 & 104)

[Case remitted back to the High Court for retrial before another judge.]

Bahasa Malaysia *Headnotes*

Ketiga-tiga tertuduh didakwa dan disabitkan bersama dan dikenakan hukuman mati untuk pengedaran dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Atas maklumat yang diterima berkenaan sindiket dadah asing yang beroperasi di Temerloh, PW5 dan pasukannya telah merancang satu serangan hendap di Hotel Green Park. Dua kenderaan dilihat di tempat letak kereta hotel, satu Honda Civic dengan seorang perempuan ('tertuduh ketiga') yang memandunya dan kereta yang lagi satu iaitu Proton Saga, dengan dua orang di dalamnya ('tertuduh pertama dan kedua'). Tertuduh ketiga, yang dilihat keluar dari kereta yang dipandunya, berjalan ke arah Proton Saga, dan berkomunikasi dengan orang-orang dalam kereta tersebut sebelum menuju ke arah hotel. Kemudiannya, tertuduh ketiga membawa PW6, ejen perangkap ke Proton Saga itu dan telah membuka pintu belakang kereta tersebut dan menunjukkan bungkusan-bungkusan yang terdapat dalam kereta itu. Polis kemudiannya menyerang hendap kenderaan-kenderaan itu dan Proton Saga diperiksa di mana satu beg plastik berwarna putih dengan label 'Joban Creation' ditemui di atas lantai belakang tempat duduk pemandu. Dalam beg plastik itu, beberapa beg plastik ditemui mengandungi bahan berserbuk dan seperti kristal. Ketiga-tiga tertuduh dan item-item itu ditahan. Ahli kimia PW4 mengesahkan bahan itu sebagai methamphetamine seberat 525.3g, dan heroin serta monoacetylmorphine seberat 173.7g ('dadah-dadah tersebut'). Di akhir kes pendakwaan, hakim bicara berpuas hati bahawa pihak pendakwaan telah membuktikan segala tuduhan pengedaran terhadap ketiga-tiga tertuduh berdasarkan kes *prima facie* dan memanggil mereka untuk memasukkan pembelaan. Tertuduh pertama menyatakan bahawa dia tidak mengetahui bahawa terdapat dadah dalam kereta yang dipandunya dan tidak berunding dengan sesiapa berkenaan penjualan dadah; tertuduh kedua menyatakan bahawa dia tidak meletakkan beg plastik itu dalam kereta dan juga menafikan bahawa dia mengetahui kandungan plastik beg tersebut dan juga menafikan bahawa dia ke Temerloh dengan tertuduh pertama dan ketiga untuk membuat transaksi dadah-dadah itu dengan PW6 dan tertuduh ketiga menafikan telah mengedar atau menjual dadah tersebut kepada PW6. Di akhir kes pembelaan, hakim bicara memutuskan bahawa tertuduh-tertuduh gagal membangkitkan keraguan

munasabah ke atas kes pendakwaan dan mendapati mereka bersalah atas pertuduhan-pertuduhan terhadap mereka dan menjatuhkan hukuman gantung sehingga mati ke atas mereka. Oleh itu, rayuan ini oleh ketiga-tiga tertuduh. Ketiga-tiga tertuduh mengemukakan alasan rayuan yang sama iaitu terdapat kegagalan keadilan yang dikenakan ke atas mereka atas keengganan hakim bicara untuk membenarkan penangguhan prosiding satu hari yang dipohon oleh peguam untuk tertuduh kedua yang baru sahaja dilantik dan terus mendengar pembelaan tertuduh kedua tanpa perwakilan undang-undang dan seterusnya mendapati ketiga-tiga tertuduh disabitkan dengan pertuduhan terhadap mereka.

Diputuskan (mengetepikan sabitan-sabitan dan hukuman; kes dikembalikan ke Mahkamah Tinggi untuk perbicaraan semula)
Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Dispensasi keadilan melibatkan undang-undang prosedur dan substantif. Keadilan tidak boleh diagihkan apabila prosedur diabaikan. Hak untuk dibela oleh peguam adalah isu undang-undang prosedur dan substantif. Hak tersebut termaktub dalam sistem keadilan kami sejak dahulu kala. Seksyen 255 Kanun Tatacara Jenayah ('KTJ') dengan jelasnya memperuntukkan bahawa setiap orang yang tertuduh di hadapan mahkamah jenayah mempunyai hak untuk dibela oleh seorang peguam bela, tertakluk kepada peruntukan nyata dalam undang-undang sebaliknya.

(2) Pada akhir pemeriksaan balas tertuduh pertama, peguam tertuduh kedua memohon untuk melepaskan dirinya dan ini telah dibenarkan. Tetapi daripada melakukan perkara yang betul dan bertanya sama ada tertuduh kedua ingin melantik peguam baru, hakim bicara telah menangguhkan perbicaraan pada 2.15 petang hari yang sama untuk pemeriksaan balas tertuduh kedua ke atas tertuduh pertama. Hakim bicara tidak memberikan alasan untuk tindakan yang diambil oleh beliau. Hakim bicara telah mengabaikan keperluan perbicaraan adil dan telah melanggar intipati s. 255 KTJ. Tiada halangan undang-undang untuk melarang peguam daripada membela tertuduh kedua. Perbicaraan ini melibatkan kesalahan besar yang membawa hukuman mati mandatori. Oleh itu, satu latitud lebih besar harus diberikan kepada tertuduh untuk cukup bersedia dan mempertahankan kes mereka dengan betul. Apa-apa yang kurang daripada norma bersyarat yang diperlukan akan menyebabkan satu salah laksana keadilan. Hakim bicara telah bertindak dengan tergesa-gesa sehingga mengorbankan keadilan.

(3) Tertuduh kedua sangat diprejudiskan apabila dinafikan peguam yang boleh bertindak untuknya dan melaksanakan pembelaannya. Di akhir pemeriksaan utama tertuduh pertama, hakim bicara telah memberitahu tertuduh kedua bahawa dia boleh sekarang menyoal tertuduh pertama.

Walau bagaimanapun, tiada rekod pemeriksaan balas dilancarkan oleh tertuduh kedua. Hakim bicara sepatutnya, memperjelaskan kepada tertuduh kedua bahawa dari segi undang-undang, kegagalan memeriksa balas bermakna penerimaan keterangan tertuduh pertama. Tetapi, hakim bicara gagal berbuat demikian. Tertuduh kedua tidak mengerti langsung bagaimana hendak melancarkan pemeriksaan balas yang efektif ke atas keterangan tertuduh pertama dan juga tertuduh ketiga. Keterangan tertuduh pertama dan ketiga dipenuhi dengan tuduh-menuduh. Tertuduh kedua dalam keadaan sangat lemah untuk menafi atau menangkis atau menentang tuduh menuduh itu.

(4) Keterangan yang sedia ada terhadap tertuduh kedua adalah tindakannya, cubaannya untuk melarikan diri, pergelutan yang berlaku, rampasan dadah dari kereta yang dinaikinya dan bahawa dia telah datang dengan tertuduh pertama dan ketiga. Dapatan fakta ini oleh hakim bicara yang membentuk dasar sabitannya. Tertuduh kedua dengan jelasnya diabaikan. Dia tidak diberikan panduan yang sesuai seperti yang diberi mandat undang-undang. Kegagalan hakim bicara mematuhi keperluan s. 257(1) KTJ telah memprejudiskan tertuduh kedua.

(5) Peguam untuk tertuduh kedua telah memohon penangguhan atas alasan bahawa dia baru sahaja dilantik oleh tertuduh kedua, tetapi ditolak oleh hakim bicara. Oleh itu, demi kepentingan keadilan, tiada mudarat atau prejudis akan berlaku jika masa diberikan kepada tertuduh kedua untuk membela kesnya dengan secukup-cukupnya. Dalam keadaan kes ini, keengganan untuk melaksanakan budi bicara menangguhkan perbicaraan seperti yang dikurniakan oleh s. 259(1) KTJ tidak dilaksanakan secara munasabah oleh hakim bicara. Tidak boleh dinafikan bahawa tertuduh kedua kurang bernasib baik apabila dia tidak diberikan arahan yang betul untuk hujahannya, sama ada secara lisan atau bertulis. Terdapat penafian haknya untuk didengar kerana hakim bicara tidak mendengar hujahannya manakala tertuduh pertama dan ketiga dan pihak pendakwaan diberikan hak dan peluang untuk berbuat demikian.

(6) Tertuduh kedua telah dinafikan perbicaraan yang adil, berjumlah kepada satu pencerobohan hak perlembagaan dan dengan itu sabitan adalah tercemar. Walaupun pelanggaran hanya berkaitan dengan tertuduh kedua, namun ia telah menyebabkan kegagalan keadilan kepada ketiga-tiga tertuduh kerana ketiga-tiga telah dituduh dengan niat bersama dalam melakukan jenayah itu di mana dalam hal sedemikian kebersalahan satu akan menjejaskan kebersalahan yang lain.

[Kes diremitkan ke Mahkamah Tinggi untuk perbicaraan semula di hadapan hakim yang lain.]

Case(s) referred to:

Azahan Mohd Aminallah v. PP [2005] 1 CLJ 374 CA ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 255, 257(1), 259(1)

For the 1st & 2nd appellants - Affifuddin; M/s Salehuddin Saidin & Assocs
For the 3rd appellant - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Nurshafini Mustapha; DPP

[Editor's note: Appeal from High Court, Temerloh; Criminal Appeal No: 45A-01-2011 (set aside).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmadi Asnawi JCA:

[1] In the trial court below, the first appellant (Ogbodo Sunday Tochukwu) was referred to as the first accused; the second appellant (Zuhaila Bt Abu Bakar) was referred to as the third accused; and the third appellant (Ororoama Chioma Darlington) was referred to as the second accused.

[2] For the purposes of this judgment, the three appellants shall be referred accordingly in the manner as they were referred to in the court below. Collectively, they shall be referred to as the accused persons.

[3] Before the trial court, the three accused persons were jointly charged and were convicted and sentenced to suffer the death penalty upon the following charges:

> Pertuduhan Pindaan Pertama
>
> Bahawa kamu bersama-sama pada 17 Disember 2010, jam lebih kurang 9.30 malam di dalam sebuah kereta Proton Saga bernombor WUE 1600 di tempat letak kereta Hotel Green Park, Jalan Tekukur Off Jalan Merbah, di dalam daerah Temerloh, di dalam Negeri Pahang Darul Makmur, dalam menjalankan niat umum bersama, telah didapati mengedar dadah merbahaya berat bersih 173.7 gram (campuran 136.1 gram heroin dan 37.6 gram monoacetylmorhines) dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama-sama seksyen 34 Kanun Keseksaan.
>
> Pertuduhan Pindaan Kedua
>
> Bahawa kamu bersama-sama pada 17 Disember 2010, jam lebih kurang 9.30 malam di dalam sebuah kereta Proton Saga bernombor WUE 1600 di tempat letak kereta Hotel Green Park, Jalan Terkukur Off Jalan Merbah, di dalam daerah Temerloh, di dalam Negeri Pahang Darul Makmur, dalam menjalankan niat umum bersama telah didapati mengedar dadah berbahaya jenis methamphetamine berat bersih 525.3 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama-sama seksyen 34 Kanun Keseksaan.

[4] The appeals before us by the accused persons were in respect of the said convictions and sentences meted out by the High Court.

[5] Upon conclusion of the hearing of the appeals before us, we dismissed their appeals and ordered the case to be remitted back to the Temerloh High Court for retrial before another judge.

[6] We now give our grounds.

The Case For The Prosecution

[7] On 12 December 2010, PW6 (Kamazudani bin Mohamad) met and informed PW5 (ASP Azli bin Mohd Noor) of a foreign drug syndicate operating in Temerloh.

[8] PW6 was then requested by PW5 to investigate the matter further. Later PW5 appointed PW6 as an agent provocateur (AP) to negotiate for the purchase of drugs from the syndicate and laying a trap to apprehend members of the syndicate.

[9] Through an acquaintance by the name of Lina, PW6 got in touch with one Linda. An arrangement was made to meet Linda the next day (13 December 2010) at an eatery near Temerloh Toll Plaza.

[10] Linda, a female, kept the appointment and met PW6 at the eatery on 13 December 2010. She came with an African male in a Honda Civic motorcar bearing the registration number WNW 9339. She introduced the African male to PW6 as "Yusof". In court, PW6 identified Linda as the third accused person.

[11] In brevity, PW6 next negotiated with the third accused and her companion for the purchase of heroin and syabu. The agreed price for heroin was set at RM14,000 per pound and RM185,000 per kilogramme for syabu. The third accused further instructed PW6 to be ready with the money before contacting her again.

[12] PW6 later briefed PW5 of the meeting with the third accused and her companion. He was instructed to proceed with the deal. PW6 then contacted the third accused and told her that he wanted to purchase sepuluh pounds of heroin and 1kg of syabu.

[13] The parties also agreed on the mode of transaction ie, by way of 'kiri kanan', meaning that the price money will be exchanged simultaneously with the drugs during the transaction.

[14] The third accused then suggested the transaction to take place at Green Park Hotel in Temerloh on either 17 or 18 December. The quantity to be supplied was finally agreed at 8 pounds of heroin and 1kg of syabu.

[15] PW6 checked into the Green Park Hotel on 16 of December upon PW5's instruction. PW6 was briefed by PW5 that when the third accused arrived at the hotel with the drugs, he was to come down from the hotel and confirmed the existence of the drugs. Upon confirmation that the third accused had brought the drugs, PW6 was to walk back towards the hotel. However, if the drugs were not available, he was to walk towards an unmarked police vehicle.

[16] Both PW6 and the third accused finally agreed the transaction to take place on 17 December at about 9pm.

[17] Meanwhile, PW5 confirmed that he was informed by PW6 of the activities of a drug syndicate operating in Temerloh. PW5 also confirmed that he had appointed PW6 as an AP for the purchase of drugs from the syndicate and laying a trap for members of the syndicate. PW5 also confirmed meeting PW6 several times to plan out the ambush at Hotel Green Park, Temerloh, the agreed location to transact the drugs. PW5 too had gone to Hotel Green Park to study the layout for the purpose of the operation. He had also booked a number of rooms at the hotel to facilitate the operation.

[18] On the day of the purported transaction (17 December 2010), PW5 had divided his men into five groups with himself leading one group. A group was also assigned to keep a lookout. PW6 was also given specific instruction of his role in the operation as narrated earlier.

[19] At about 9.15pm, PW5 was notified by the lookout group of the entry of two vehicles, one Honda Civic, bearing the registration number WNW 9339 with a lady at the wheel and the other being a Proton Saga bearing the registration number WUE 1600, with two persons inside. PW5 was further informed that the two vehicles have proceeded to the hotel car park.

[20] PW5 further testified that he saw the two vehicles arriving at the hotel car park. The vehicles stopped to park side by side. PW5 next saw the third accused alighting from the motorcar she was driving and walked towards the Proton Saga motorcar. He saw the third accused communicating with the persons therein before walking towards the hotel.

[21] PW5 then saw the third accused meeting PW6 and talking with him. Later both of them walked back towards the car park where the two vehicles were parked and went to the Proton Saga motorcar bearing the registration number WUE 1600. The third accused opened the back door of the said Proton Saga motorcar and gestured PW6 to look inside, which PW6 did.

[22] Now, PW6 testified that upon arrival at Hotel Green Park, the third accused asked him to come down with the money. PW6 did come down and insisted that he wanted to see the drugs first before allowing the third accused to count the money. About five minutes later the third accused brought him to the Proton Saga motorcar bearing registration number WUE 1600. PW6

saw two male Africans inside the motorcar, one being the driver and the other sitting at the front passenger seat. The third accused next proceeded to open the back door of the said motorcar and showed packages in the motorcar. PW6 recognised the green substance in the packages to be heroin.

[23] PW6 then walked towards the hotel on the pretext of delivering the money, the agreed signal for the police to act. PW5 then gave the order to 'lelong' which was the agreed code word used to move in.

[24] Two police personnel wearing the police vest then moved from the front. On seeing this, the driver of the Proton Saga WUE 1600 hurriedly reversed his motorcar and knocked into a police vehicle blocking at its rear. The driver then moved his vehicle forward and again reversed to try to slip through the police vehicle blocking its way. At this juncture, PW5 issued the orders to shoot at the tyres of the motorcar. The motorcar stopped after shots were fired at its tyres.

[25] The police team then seized the ignition key of the said Proton Saga WUE 1600 and opened the doors of the motorcar to pull out the two Africans, later identified as the first and second accused persons. Both the accused put up a strong resistance before being subdued. Both the accused were slightly injured as a result of the struggle. Nothing incriminating though were recovered from their persons. The third accused was also detained by the police.

[26] PW5 next searched the Proton Saga WUE 1600. He found a white coloured plastic bag labelled "Joban Creation" on the floor board behind the driver's seat. Inside the said plastic bag was another plastic bag carrying the words "PREET'S". Inside this "PREET'S" plastic bag was a "Bonia" chocolate box wrapped in black coloured plastic wrappings. Upon opening the chocolate box, PW5 found 29 translucent plastic packets containing powdery and crystal like substance (serbuk dan ketulan jernih) suspected to be syabu.

[27] There was also another brown coloured paper bag with the words "Mid Autumn Melody" inside the said plastic bag labelled "Joban Creation". Inside this "Mid Autumn Melody" paper bag was a translucent plastic packet wrapped with an orange coloured paper containing green powdery and crystal like substance suspected to be heroin. There were seven other sealed silver coloured plastic packets inside this "Mid Autumn Melody" paper bag. PW5 proceeded to open these seven plastic packets and found in each packet, a translucent plastic packet containing whitish powdery and crystal like substance (serbuk dan ketulan warna keputihan) which he suspected to be heroin.

[28] PW5 also recovered copies of the first and second accused's passports and a student card inside the said Proton Saga WUE 1600.

[29] The other exhibits recovered by PW5 from inside the said motorcar were as itemised by him in the borang senarai pemeriksaan, exh. P19, at pp. 947, Jilid III, rekod rayuan ('RR'). A

[30] The three accused persons and the items seized were taken to Temerloh Police Station, where PW5 proceeded to lodge an arrest report. Subsequently the three accused and items seized were handed over to the investigating officer, PW9 (Inspector Sharifah Hazrina binti Syed Mohd Zulkifli), together with the borang senarai pemeriksaan. B

[31] PW9 had the suspected drug exhibits sent to the chemist, PW4 (Khairil Hadi bin Abd Raof), for analysis. PW4 confirmed the substance to be methamphetamine weighing 525.3g and heroin and monoacetylmorphine weighing 173.7g, (hereinafter referred to as the said drugs), all listed in the First Schedule of the Dangerous Drugs Act 1952 (hereinafter referred to as the 'DDA'). His report is exh. P10 at pp. 938-939, Jilid III, RR. C

[32] At the end of the prosecution's case, the learned trial judge was satisfied that the prosecution had proven all the trafficking charges against all the three accused on a *prima facie* case basis and called all the three to enter their defence. D

The Defence

[33] All the three accused opted to give evidence on oath. E

The Defence Of The First Accused

[34] The first accused testified that the second accused is his friend and had known him since their days in Nigeria. Both had come to Malaysia about four months prior to their arrest to further their studies in local institution of higher learning, though at different colleges. F

[35] On 16 December 2010, he had borrowed his girlfriend's Proton Saga WUE 1600, one Lydia, an Indonesian national.

[36] On 17 December 2010, at about 6pm he met the second accused at a cafe where the latter then requested him to take him to Temerloh. The second accused had wanted to send a message he had received from his brother who was in Nigeria to someone. G

[37] The first accused agreed to take the second accused to Temerloh. He drove the car to Temerloh. He has never been to Temerloh before and merely followed the road signboards to Temerloh. H

[38] The first accused testified that he did not know the third accused and has not met the third accused prior to their arrest.

[39] After the toll plaza they met the third accused. The second accused told him to slow down and stop and then to follow the third accused's Honda Civic motorcar bearing the registration number WNW 9339 from behind. They entered Green Park Hotel about five minutes later. I

[40] When he asked the need to follow the third accused, the second accused replied that his brother had asked him to go and see the third accused. The second accused told him that his brother's name is Yusof, a Nigerian, also known as Kachi Omye and that the third accused is Yusof's wife. Yusof has gone back to Nigeria on 15 December 2010.

[41] The third accused parked her motorcar at the hotel car park. He followed suit and parked his motorcar next to the third accused's motorcar. The third accused then asked him to wait while she went to the hotel.

[42] The next thing he saw were armed men in civilian clothings pointing guns at him. He thought they were criminals. He did not hear anything as the car windows were wound up and car radio was blazing with music. He was frightened and tried to reverse his motorcar and flee but failed when the motorcar got stuck.

[43] Both the first and second accused were immediately handcuffed when they got down from their motorcar. The gunmen then told them that they were police officers. He did not resist arrest or tried to flee the scene.

[44] Before the engagement with the gunmen, the third accused came over to his car with the AP and asked him to unwind down the glass window. He did so but did not quite understand what the third accused was speaking as she spoke in Malay language.

[45] The first accused averred that he did not know that there were drugs in the motorcar he was driving nor had negotiated with anyone for the sale of the drugs. The first accused also averred that he did not have any drugs in his possession or keeping or selling or trafficking in drugs on 17 December 2010.

The Defence Of The Second Accused

[46] The second accused testified that he is Nigerian national and there are two other siblings in his family, both sisters. He has no male sibling and Yusof is not his brother as averred by the first accused. He did not know that Yusof's nickname is Kachi Omye. He did not know the third accused and did not know that the third accused is Yusof's second Malaysian wife. He met the third accused for the first time only on the day of their arrest on 17 December 2010. Equally he did not know that Yusof had another Malay Malaysian wife, Yasmin.

[47] The second accused said that the first accused is his friend and fellow countryman and he (the second accused) had come to Malaysia to enhance his educational standing.

[48] On 16 December 2010 the first accused called to inform him that their friends had wanted to take both of them out to see their other friends on 17 December 2010. He agreed to meet their other friends.

[49] At about 5pm on 17 December 2010, the first accused came to his house at Sungei Long, Cheras, in a Proton Saga motorcar to pick him up. He entered the motorcar and they drove to Temerloh with the first accused at the wheel. Upon his complaint that the journey was too long, the first accused told him that they were almost there.

[50] On reaching the toll plaza at Temerloh, the first accused stopped his motorcar by the roadside and made a phone call. He then saw a Honda motorcar parked in front of the first accused's motorcar. Two women got down from the Honda motorcar and approached the first accused. The first accused then got down from the driver's seat and met the two women.

[51] The second accused identified the third accused as one of the women who got down from the Honda motorcar. The other woman was the first accused's girlfriend and was not in court to be identified.

[52] A short while later, all the three persons went back to their respective motorcars and continued with the journey. The first accused followed the third accused's motorcar from the rear.

[53] They arrived at a very big house with a huge compound with lot of space for parking lots. The Honda motorcar stopped and parked at one of the parking lots. The first accused proceeded to park his motorcar next to the Honda motorcar.

[54] The two women got down from their motorcar. The third accused went over to meet them and told them to wait inside their motorcar. The two women then entered the big house.

[55] They had to roll up their car windows as it was raining and had the car radio blazing with music.

[56] The third accused and the other woman emerged from the big house about ten minutes later, now accompanied by a male. The third accused then pointed at their motorcar. The said male came to their motorcar and looked attentively towards the inside of the motorcar. When it was done, the third accused and the said male went back into the big house.

[57] About nine to ten minutes later, a group of armed men emerged and surrounded their motorcar. He was frightened. He thought they were armed robbers. The first accused then reversed his motorcar to flee the scene but knocked into a motorcar blocking its rear. One of the armed men started to shoot at the tyres of the motorcar and used the butt of his gun to break the side windows of the motorcar. The first accused stopped his motorcar.

[58] He was dragged out of the motorcar. So was the first accused. They were handcuffed and beaten. The armed men then told them that they were policemen. A body search was conducted upon him. However, nothing incriminating was recovered from his person.

[59] The police subsequently searched the said motorcar.

[60] He saw another group of policemen arresting the third accused while the said motorcar was being searched.

[61] After the search he was taken to Temerloh Police Station together with the first and third accused.

[62] In cross-examination the second accused said that he saw the plastic bag inside the said motorcar only after his arrest and denied the suggestion that his sister or Yasmin had placed the said plastic bag at the back cushion behind the driver's seat. He averred that he did not see who placed the said plastic bag in the motorcar and equally denied that he knew the contents of the said plastic bag, ie, drugs. He also denied that he went to Temerloh with the first and third accused persons to transact drugs with the AP (PW6).

The Defence Of The Third Accused

[63] The third accused testified that she did not know the first accused and crossed path with the first accused only on the day of their arrest.

[64] The second accused is the brother of her lover, one Yusof, also known as Kachi Omye, whom she had known since 2006. The second accused was introduced to her as such by the said Yusof. She had been to the second accused's house a number of times to accompany Yusof on the occasions of Yusof's visit to the second accused's house.

[65] She knew at all times that Yusof is still married to another Malaysian, one Yasmin. She stayed with Yusof at Kompleks Pangsapuri Mutiara, Jalan Ipoh, Kuala Lumpur.

[66] She knew early in her liaison with Yusof that Yusof's principal vocation was trafficking/selling drugs. Yusof would normally store his stuff at the second accused's house.

[67] In brevity, the third accused denied meeting PW6 on 13 December 2010 at a restaurant close to the Temerloh Toll Plaza to negotiate the sale of drugs. She averred that on the day in question, she went with Yusof upon Yusof's request to meet PW6 to act only as an interpreter since Yusof is not conversant in Bahasa Melayu. However, the irony is, she also said that she did not know what transpired between Yusof and PW6 at the said meeting.

[68] The third accused also denied PW6's averment that PW6 got to speak to her through the phone through one Lina though admitting that she knew Lina and that Lina was also Yusof's acquaintance. She also denied fixing the said date (13 December 2011) to meet PW6 at the aforesaid restaurant. It was all Yusof's doing.

[69] On 15 December 2010, she sent Yusof to KLIA to depart to Nigeria to visit his ailing mother. The second accused and Yasmin also came along to bid Yusof off.

[70] Before departing, Yusof informed her that he had given her phone number and the second accused's phone number to PW6 and that PW6 will call her in due course. Yusof also requested her to bring the second accused to meet PW6 in Temerloh. She was also told to take RM180,000 from PW6 in the event PW6 gives the said sum to her.

[71] On 16 December 2010, she received a phone call from PW6 enquiring when she could come to Temerloh to bring the second accused to see him. She did not fix any date to meet PW6 though.

[72] The third accused testified that on 17 December 2010 at about 5pm, she received a phone call from the second accused informing her that he is leaving for Temerloh with a friend in about two hours' time in a Proton Saga bearing the number WUE 1600. He had wanted to hand over the 'barang' to PW6. She replied that she will wait for him at Temerloh Toll Plaza.

[73] The third accused continued that she met the second accused at Temerloh Toll Plaza at about 8.30pm. She saw the first accused at the wheel in the Proton Saga motorcar with the second accused. That was the first time she saw the first accused.

[74] Next she proceeded to Hotel Green Park, Temerloh, as PW6 had at about 7pm, called her that he was at the said hotel.

[75] At about 9pm she arrived at the said hotel and parked her motorcar at the parking lot. The Proton Saga motorcar was parked about three parking lots away. She called PW6 to notify her arrival. PW6 then came over to her motorcar and asked whether the 'barang' exist. She got down from her motorcar and walked to the Proton Saga motorcar to show the 'barang' to PW6. The second accused rolled down the glass window, prompting PW6 to look at the 'barang' inside the motorcar. She too saw the 'barang' inside a plastic bag placed on the floor board of the rear seat of the Proton Saga motorcar. She had not seen the same before this. When that was done she walked to the hotel together with PW6 to count the money.

[76] The third accused continued that she and PW6 took the lift to go to a room to count the money. The lift stopped at the third floor. She heard gun shots when she stepped out of the lift. PW6 fled immediately. She stayed put though and within two or three minutes, the police arrived and effected her arrest.

[77] She was taken to the parking lot by the police. She saw both the first and second accused pinned on the ground, already handcuffed. Her Honda Civic motorcar was searched by the police but nothing incriminating was found.

[78] The third accused averred that she did not have any drugs in her possession on the day in question. She also denied trafficking or selling the said drugs to PW6. Equally, she denied negotiating with PW6 for the sale and purchase of the said drugs on 13 December 2010.

[79] At the end of the defence, the learned trial judge found at p. 786, Jilid III, RR:

> In this case the evidence has in fact reached the point of certainty having regard especially to the unblemished evidence of SP5 and SP6. The accused have failed even to raise a whiff of a doubt let alone a reasonable doubt. I therefore found all the 3 accused guilty of both the charges against them and sentenced them to the only available sentence of death by hanging.

The Appeal Before Us

[80] The three accused posited a common ground of appeal that there was a failure of justice inflicted upon them on account of the learned trial judge's refusal for a day's adjournment of the proceedings applied by counsel for the second accused who was only recently appointed and proceeded to hear the second accused's defence without legal representation and thereafter found the three accused stand convicted of the charges proffered against them.

[81] The three accused were represented by counsel of their choice throughout the entire case for the prosecution until they were ordered to enter their defence when they started to change their counsel.

[82] The chronology leading to the accused's complaint as recorded in Jilid II, RR appears as follows:

(i) 17 May 2012 - pp. 565, 571

- TPR Amir Abu Bakar bin Abdullah appeared for the prosecution.
- Mohd Yusof with Mohd Rizal appeared for the first and second accused.
- Aida Rahayu bt Abd Rahman appeared for the third accused.
- The learned judge found the prosecution has established a *prima facie* case against all the three accused and ordered them to enter their defence.
- Counsel for the three accused notified the court that the three accused had opted to give their evidence on oath.
- The hearing was adjourned to 25 June 2012 on an application by counsel for the first and second accused upon various grounds.

(ii) 26 June 2012 - p. 575.

- No change in counsels appearing for the parties therein.
- The matter was adjourned to 26 July 2012 for mention.

(iii) 26 July 2012 - p. 576.

- The matter was fixed for case management before the SAR.

- Now Zaki Idzha appeared for the first and second accused. He claimed to have been appointed as counsel on 25 July 2012 and would be applying for documents from the court and previous counsel.

- Equally, now Aniza bt Abdul Aziz appeared to act for the third accused, claiming to have been appointed on 23 July 2012 and shall do the needful.

- The matter was further adjourned to 6 September 2012 for mention.

(iv) 6 September 2012 - p. 577.

- the matter was again set for case management before the SAR.

- Aida Rahayu bt Abd Rahman now present to initially act for the third accused and mentioning on behalf of counsel for the first and second accused.

- She then confirmed to have discharged herself from acting for the third accused.

- The matter was adjourned to 20 September 2012 for mention before the learned trial judge.

(v) 26 September 2012 - p. 579

- The matter was mentioned before the learned trial judge.

- The parties were: TPR Siti Hajar bt Mustapha for the prosecution; Zaki Idzha for the first and second accused; Aniza bt Abd Aziz for the third accused.

- The matter was fixed for hearing on 1 and 2 November 2012. However, there was no record what took place on 1 and 2 November 2012. The record shows that the case was next mentioned on 22 January 2013.

(vi) 22 January 2013 - p.581

- Again there was a change in counsels appearing for the accused.

- Zaki Idzha's applied to discharge himself from acting for the first and second accused and was allowed by the learned trial judge.

- Gurbachan Singh now stepped in to act for both the first and second accused.

- There is no record of the counsel for the third accused nor the presence of counsel for the third accused.

- The matter was further adjourned to 14 February 2013 for mention.

(vii) 14 February 2013 - p.582

- S Doraisamy appeared to mention on behalf of Gurbachan Singh, counsel for the first and second accused.
- There is no record of counsel for the third accused and of his/her presence in court.
- The matter was fixed for continued hearing on 3 April 2013.

(viii) 3 April 2013 - p. 583.

- Gurbachan Singh was present to act for the first and second accused.
- There is no record of counsel for the third accused nor the presence of counsel for the third accused.
- The hearing was adjourned to 15 April 2013 on account of non-availability of a Nigerian interpreter.

(ix) 15 April 2013 - p. 584.

- Again there was a change of counsel.
- Gurbachan Singh now informed the court that he was acting for the first and third accused and has been discharged by the second accused.
- Sharizal notified the court that he is acting for the second accused with Faiz.
- Shahrizal applied for an adjournment of the day's hearing on grounds that he had just been retained by the second accused - see p. 586, Jilid II, RR.
- The learned trial judge refused Shahrizal's application for adjournment and proceeded with the hearing with the first accused giving his evidence in chief on oath - see p. 586, Jilid II, RR.
- At the end of the first accused's examination in chief, Shahrizal applied to discharge himself from representing the second accused and was allowed by the learned trial judge - see p. 613 of the same Jilid. The hearing was adjourned to 2.15pm for the second accused to cross-examine the first accused.
- When the hearing resumed in the afternoon after further examination of the first accused by Gurbachan Singh, the second accused was told by the learned trial judge that he can now question the first accused - see p. 618.
- There is no record of any cross-examination by the second accused and the court noted, at p. 619, Jilid II, RR:

> OKT(2) tidak ada Soalan Balas kerana tidak diwakili peguambela.

Soalan Balas oleh Timbalan Pendakwa Raya.

- Upon conclusion of the cross-examination and re-examination of the first accused, the learned trial judge explained the three alternatives of mounting a defence to the second accused to which the second accused elected to give evidence on oath.
- The second accused took the oath but told the court, at p. 621; Jilid II, RR:

I don't know what to say because I doesn't have any lawyer.

The learned trial judge told him at the same page:

Nevermind, on the 17th, on the day you were arrested you can start from there. What happened on that day, where you came from, why you came, all that you can say.

- The second accused proceeded to give his evidence in chief in person and was so till the conclusion of the trial.

[83] We were mindful of the accused's propensity of changing their counsels with such regularity. Such conduct is most deplorable and must never be condoned. It not only had caused wastage of precious judicial time but also delays in disposal of cases and contributed to the backlog of cases pending trial, the sort of thing berated by all and sundry. It took almost 11 months for the court to finally hear the defence after the accused were ordered to enter their defence. We could discern the exasperation of the learned trial judge being confronted with such behaviour.

[84] However, the prime consideration must still be grounded upon the upholding of justice. The dispensation of justice involved both procedural and substantive law. Justice cannot be dispense when its procedures are ignored. The right to be defended by counsel is both an issue of procedure and substantive law. The said right is embedded in our criminal justice system since time immemorial. Section 255 of the Criminal Procedure Code (CPC) expressly provides that every person accused before any criminal court may as of right be defended by an advocate, subject to any express provision of the law to the contrary.

Counsel For Second Accused Discharging From Representing The Second Accused

[85] At the end of the cross-examination of the first accused on 15 April 2013, counsel for the second accused, Sharizal, applied to discharge himself. Sharizal's application was promptly allowed - see p. 613, Jilid 11, RR. But instead of doing the right thing of inquiring whether the second accused would want to engage a new counsel, the learned trial judge adjourned the hearing to 2.15pm the same afternoon for the second accused's cross-examination of the first accused. The learned trial judge offered no ground over the course of action taken by him.

[86] In our view, the learned trial judge had ignored the requirement of a fair trial and had breached the essence of s. 255 of the CPC. There is no legal impediment then to prevent counsel from defending the second accused. We were of course very mindful that s. 255 is not a mandatory provision and of the many adjournments sought by the accused when they embarked on a series of change of counsel, but this trial involved a capital offence carrying the mandatory death penalty. Hence, a greater latitude ought to be given to the accused to adequately prepare and properly defend their case. Anything short of the requisite norm would occasion a miscarriage of justice. Apparently the learned trial judge, though laudable, had acted in haste at the expense of justice.

[87] It is also apparent that the second accused was greatly prejudiced by the denial of counsel to act for him and conduct his defence. At the end of the first accused's examination in chief, the learned trial judge told the second accused that he can now question the first accused. However, as stated earlier, there is no record of any cross-examination mounted by the second accused. The learned trial judge should but did not explain to the second accused that in law a failure of cross-examination means an acceptance of the evidence of the first accused. The learned trial judge had merely noted that:

> OKT(2) tidak ada Soalan Balas kerana tidak diwakili peguam bela.

[88] With this notation, we could only surmise that the second accused was thoroughly clueless on how to go about in mounting an effective cross-examination of the first accused's evidence and for that matter, the third accused's. The evidence of the first and third accused were replete with blame game. Both of them took the safest trail by heaping the entire culpability upon the second accused and Yusof and without counsel, the second accused was profoundly hapless to negate or repel or resist such blame game.

Principal Points Against Second Accused Not Explained

[89] Now, it is the turn of the second accused to take the stand. He took the oath and told the court, at p. 621, Jilid II, RR:

> I don't know what to say because I doesn't have any lawyer.

[90] Section 257(1) of the CPC provides the course of action to be taken by the court in a situation where the accused is undefended. The section states, *inter alia*:

> … and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

Instead of adhering to the provision, the learned trial judge merely instructed the second accused:

> Never mind, on the 17th, on the day you were arrested you can start from there. What happened on that day, where you came from why you came, all that you can say.

[91] In our view, what was instructed by the learned trial judge to the second accused was verily out of sync with the requirement of s. 257(1) of the CPC. The telling evidence against him was his alleged conduct, his attempt to flee, the struggle he put up, the seizure of the drugs from the car he was travelling in and that he came with the first and third accused and it was these factual findings by the learned trial judge that formed the basis of his conviction. The second accused was clearly disadvantaged. He was not given the proper guide as mandated by law.

[92] In his grounds of judgment at p. 783 of Jilid III, RR, the learned trial judge stated:

> Nevertheless to facilitate the 2nd accused in defending himself as the case progressed the gist of the evidence was explained to him to allow him to cross-examine the 2 other accused ...

We have tooth-combed the RR and could find nothing of the sort stated by the learned trial judge, save for his statement at p. 616 reproduced at para. 90 above. The learned trial judge did no justice to the second accused.

[93] Learned counsel for the second accused brought our attention to a passage from a decision of this court in *Azahan Mohd Aminallah v. PP* [2005] 1 CLJ 374 p. 385 (CLJ); [2004] 6 AMR 810 at p. 821, on the purport of s. 257(1) of the CPC:

> [18] The section has been considered by the High Court in a number of cases including, *Shaari v. PP* [1963] MLJ 22; *Awaluddin b. Suratman & Ors v. PP* [1993] 2 MLJ 131 and by this Court in *Lokhman b. Abu v. PP* [2001] 1 AMR 512; [2012] 1 MLJ 311. In the last of these cases we had the opportunity to observe that the failure to comply with s. 257(1) 'would attract different consequences in each case according to its own facts'. That is the view to which we adhere. The question is whether on the facts of the present case, the failure by the Sessions Court to comply with the section has seriously prejudiced the appellant. We think it has.

We were on all fours with the ruling therein and on the facts we harboured no doubt that the failure by the learned trial judge to comply with the requirement under s. 257(1) of the CPC has immensely prejudiced the second accused.

Application For Adjournment By Counsel For Second Accused

[94] On 15 April 2013, counsel for the second accused (Sharizal) had applied for an adjournment on the ground that he had just been retained by the second accused, but was refused by the learned trial judge. This ground appeared to be a valid ground, supported by the fact that during the last hearing date scheduled on 3 April 2013, the second accused was still represented by Mr Gurbachan Singh.

[95] Notwithstanding that the learned trial judge had warned the parties on 3 April 2013 that he was prepared to proceed with the hearing of the case in the absence of counsel as there was still no counsel on record for the third accused, we were of the view that considering the serius nature of the charge levelled against the second accused which carries the mandatory death penalty, we do not see what injury the justice system would have suffered if the learned trial judge had granted Mr Sharizal's request. As is trite, every latitude must be given to an accused person to defend his case.

[96] Additionally, the trial was already at its tail end. The majority of the witnesses have testified and the court has ordered the accused to enter their defence. It is only a matter of time that the trial will come to its conclusion. Hence, in the interest of justice no harm nor prejudice would occur if a little bit more time is given to the second accused to adequately defend his case. We were of the view that in all the circumstances of the case, the refusal to exercise the discretion to adjourn the trial conferred by s. 259(1) of the CPC was not reasonably exercised by the learned trial judge.

No Submission Made By The Second Accused At End Of The Defence Case

[97] Learned counsel for the second accused also raised the complaint that the second accused was not given the opportunity to submit either orally or written at the end of the case for the defence.

[98] The case for the defence was concluded on 29 May 2013 - see p. 738, Jilid 2, RR. The learned trial judge allowed the application made by learned counsel for the first and third accused for another date for submission and/ or for the proposed calling of another witness. The learned trial judge also gave allowance for learned counsel to put in a written submission.

[99] The matter was again mentioned on 26 August 2013 wherein the learned trial judge remarked that he had received the written submissions of learned counsel for the first and third accused and the learned TPR and had allowed further submissions by them, if any - see p. 761 of Jilid III, RR. The written submissions of the first and third accused and that of the prosecution at the end of the defence case are at pp. 874 to 878 and 879 to 888, Jilid III, RR, respectively.

[100] On 28 August 2013, the court found all the accused guilty - see p. 762, Jilid III, RR.

[101] However, nothing was said as regards to the second accused. Hence, learned counsel for the second accused submitted that the learned trial judge had erred in the following ways:

(i) did not advise the second accused separately that he is required to file in a written submission before the given date or at the very least direct the prison authorities to provide him with the conveniences to allow him to prepare his written submission, like pen, writing paper, etc;

(ii) there is no evidence that the second accused was given a set of the notes of proceedings to enable him to prepare a written submission; and

(iii) a final decision was pronounced on 28 August 2013 in the absence of a written or oral submission from the second accused.

[102] Accordingly, learned counsel for the second accused submitted that there has been a failure of justice. We were with him. There can be no denying that the second accused was overwhelmingly disadvantaged when he was not given the proper direction to put in his submission, either oral or written. There has been a deprivation of his right to be heard on account that the learned trial judge did not hear his submission whereas the first and third accused and the prosecution was accorded the right and opportunity to do so.

Conclusion

[103] On account of the infirmities in the conduct of the trial by the learned trial judge enumerated above, we were with the submissions of learned counsels before us that the second accused had been deprived of a fair trial, amounting to an infringement of a constitutional right and as such the conviction is tainted - see *Lee Kwan Woh v. PP* [2009] 5 CLJ 631, at para. 18 p. 645. Although the infringement relates only to the second accused, nevertheless it had occasioned a failure of justice to all three accused as all three were charged with common intention in committing the crimes where in such event the culpability of one would invariably affect the culpability of the others.

[104] For all the reasons given above, we dismissed the appeals by the accused persons and we ordered the case to be remitted back to the Temerloh High Court for retrial before another judge. Their convictions and sentences are hereby set aside.